Petition

81-1223

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CARGO GASOLINE COMPANY,
CARGO SERVICE STATIONS, INC.,
and EASTERN OIL COMPANY,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION

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QUESTIONS PRESENTED

I

WHETHER, IN A SHERMAN ACT CRIMINAL PROSECUTION FOR PRICE FIXING OF RETAIL GASOLINE, THE DISTRICT COURT IS REQUIRED TO INSTRUCT THE JURY ON SPECIFIC INTENT OR TO INSTRUCT THE JURY THAT AN ANTI-COMPETITIVE EFFECT UPON PRICES MUST BE PROVED IN ORDER TO CONVICT, RATHER THAN INSTRUCTING THEM THAT A CONSPIRACY TO FIX PRICES WAS ILLEGAL AS A MATTER OF LAW AND THAT THE GOVERNMENT DID NOT HAVE TO PROVE EITHER SPECIFIC INTENT TO RESTRAIN TRADE OR THAT THERE WAS ANY RESTRAINT OF TRADE?

II

WHETHER PRINCIPLES OF COLLATERAL ESTOPPEL INHERENT IN THE CONSTITUTIONAL PROVISION AGAINST DOUBLE JEOPARDY PRECLUDE A CONVICTION OF A CORPORATION FOR VIOLATING THE SHERMAN ACT WHEN, IN THE SAME TRIAL, THE AGENTS UPON WHOSE ACTION THE CORPORATION'S DERIVATIVE LIABILITY IS BASED ARE AQUITTED?

PARTIES BELOW

United States of America
Cargo Gasoline Company*
Cargo Service Stations, Inc.*
Eastern Oil Company*
T.D. McRae, Inc.
United Petroleum, Inc.

* Petitioners in this Court.

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II

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Cargo Gasoline Company, Cargo Service Stations, Inc. and Eastern Oil Company ("Petitioners") petition for a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Fifth Circuit in this cause. Circuit Court proceedings subsequent to the Opinion have been in the Eleventh Circuit under P.L. 96-452.

OPINION BELOW

The Opinion of the Court of Appeals (App.A., *infra*) is reported at 657 F.2d 676.

JURISDICTION

No judgment of the Court of Appeals has been entered. A Motion to Stay the Mandate and Judgment has been filed pending this Petition. A Petition for Rehearing *en banc* was timely filed on October 12, 1981, and was denied on November 2, 1981. (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the Double Jeopardy and Due Process clauses of the *United States Constitution*, Amendment V, and the Sherman Anti-Trust Act, 15 U.S.C. §1, which are set out in App. C, *infra*.

A. Jurisdiction Below.

Jurisdiction in the United States District Court, Middle District of Florida, Jacksonville Division, was premised upon 15 U.S.C. §4.

B. Procedural History.

Petitioners, ten other corporations (including two corporations who were appellants below), and four individuals were charged in a single count indictment in the United States District Court, Middle District of Florida, Jacksonville Division, with engaging in a continuing conspiracy to fix prices in the retail sale of gasoline in Florida, in violation of the Sherman Act. Various other persons and entities, including Florida Independent Gasoline Marketers Association (FIGMA), were named as unindicted co-conspirators.

The jury, after deliberating from March 26, 1980, to April, 1980, having announced several times that they were deadlocked, having received a modified Allen charge on two occasions and having had the charge of court reread to them four times, returned verdicts finding the corporations guilty but finding the three individuals (L. M. Hughey, James D. Kelley and T. D. McRae) not guilty. (R. Vol. VIII).[1]

Upon appeal to the Fifth Circuit Court of Appeals by Petitioners and T. D. McRae, Inc., and United Petroleum, Inc. (the McRae companies), the judgment of the United States District

1/ References used in this petition are to the transcript of trial proceedings consisting of eight separately bound volumes numbered Volume I to Volume VIII, which appear in the Record on Appeal in Volumes 22-28, 30.

Court, Middle District of Florida, Jacksonville Division, was affirmed. (App. A, *infra*). The Petitioners were fined in the aggregate, $500,000.00.

C. Facts.

L. M. Hughey and James D. Kelley, two of the three individuals found not guilty at trial, were the only persons connected with the Petitioners who had gasoline pricing authority for those companies.

Petitioners and others were charged as conspirators to fix retail gasoline prices are what are known in the trade as Independents. Unlike major gasoline companies such as Gulf, Texaco, Exxon, etc., the Independents catered to local trade, did not advertise and offered very little in the way of other services to customers. The Independents were highly competitive and frequently became involved in "gas wars" during the indictment period.[2]

The Government sought to prove at trial that Sid Gervin, the Chief Executive Officer of FIGMA during the indictment period, was the hub of the conspiratorial wheel; however, Gervin was not called to testify. The Government relied upon other people to testify to what Gervin supposedly said in furtherance of the alleged price fixing conspiracy.

The Opinion of the Fifth Circuit (657 F.2d at 680-681) sets forth a capsule statement of the evidence concerning conversations between FIGMA Executive Sid Gervin and the alleged co-conspirators and others, and contacts between competitors discussing price moves, and a meeting at which one topic discussed was the appropriate price difference to be charged for gasoline at

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2/ Up to this point, the Statement of the Case and Facts are substantially taken from the opinion of the Fifth Circuit's decision sought to be reviewed. Because the opinion below contains little discussion of the evidence relating specifically to the Petitioners nor refers to other parts of the record Petitioners believe pertinent to the issues raised, and for other reasons discussed elsewhere, Petitioners are requesting that the record below be certified pursuant to Supreme Court Rule 19.2.

self-service stations and full service stations. The Opinion (657 F.2d at 681) fairly admits that this evidence was susceptible to differing interpretations. While the Opinion states that the Government presented "direct evidence" of price fixing as well as evidence from which price fixing could be "inferred," the credibility and meaning of all the evidence was rigorously contested by the Petitioners, including the Petitioners' intent and the actual effect, if any, upon competition. The Opinion concedes that from a jury standpoint the evidence as a whole "reasonably might be persuasive" as evidence of a mere exchange of pricing information which does not invariably have anti-competitive effects.[3]

The testimony considered in the light most favorable to the verdict showed that on certain occasions there was information passed either from Gervin, or other independent marketers, to independent marketers statewide or in particular areas that there was going to be an upward price move, beginning on a date certain, to a particular price level, and that some of the independent marketers agreed to "support" the price moves purportedly to be made. Some independent marketers would agree to "take a look" at the market in response to the information received. To agree to "support" meant that the company involved would move its price for regular gasoline to the level indicated or that the company would take a look at the market and then make a decision whether or not to move prices. By agreeing to "take a look" at the market, the companies so indicating meant that they would do just that; wait and see if the price actually advanced to the level indicated. If it did, the company or companies involved would move their prices accordingly, or in instances would not do anything. (P. 78-131; 167-174; 240-241).

3/ Suffice it to say that a properly instructed jury might have concluded that Petitioners' purpose in engaging in these communications (which the opinion below characterizes as "direct evidence of price fixing", 657 F.2d at 681) was to fix their own and their competitors' prices by agreement rather than through the free play of competition and to collusively coordinate price movements between competitors. A jury could also have concluded, to the contrary, that their purpose was to quell rumors and insure that they and their competitors could make pricing decisions on the basis of accurate information about competitive market conditions rather than on speculation and surmise.

Very few of the price moves purported to be made lasted for more than three days to a week, because uniform agreement was impossible to obtain and those companies who did not advance their prices would cause a lowering of prices. The companies who had advanced prices would, in such instances, back their prices down to meet the competition. Approximately ten to fifteen per cent of the price moves gained sufficient support from other companies. (R. 93).

On the occasions when price moves were advocated and some gasoline stations did not advance their prices, calls would be made in an effort to get the prices at those stations up to the level of the price move. Typical of such calls is the testimony of Larry Castro:

> Q. What was the nature of these calls?
>
> A. The same nature, either I was out of the marketplace, I was either too high or too low. The majority of the time I was too low, and the competition was higher than I was.
>
> Q. What would you tell him?
>
> A. That I would survey, take a survey of the market, and if I was out of the marketplace, I would adjust accordingly if I wanted to. It depends upon the location. Sometimes I would adjust my price up, sometimes I would leave them down.
>
> Q. Did you ever tell him you would adjust your prices?
>
> A. If I was below the market, yes.
>
> (R. 1070-1071).

The witnesses invariably testified that whether or not a change was made depended upon the actual market activity in their areas. (R. 167, 235, 802, 916, 1045-1046, 1100).

All witnesses agreed that the condition of the gasoline retail market was depressed during the indictment period. Typical of

the testimony concerning market conditions was the testimony of Larry Castro:

> A. The condition of the retail market, we were in a depressed market. There was a lot of people about ready to go bankrupt, and it was very very depressed.
>
> Q. You used the term several times, I noted, in your testimony, you called it restore the market. What does that term mean as you used it?
>
> A. Okay, it means to get out of the depressed market, which is a non-profitable market into a profitable market.
>
> (R. 1084-1085).

Several witnesses testified about a meeting which took place in October, 1975, in Tampa, Florida, attended by a group of independent marketers (25 to 30 people present) to discuss "self service marketing which was relatively new in the State, and the gist of that conversation was not specific prices, but the spread between the different methods of marketing." (R. 139-140). There was no concensus reached at the meeting as to the differential prices to be charged at self service pumps and full service pumps. (R. 142). The subject of gasoline pricing was a topic of discussion whenever and wherever independent marketers gathered. (R. 143). One witness testified that there was an effort at the Tampa meeting to restore prices to a normal level because of the depressed market at the time, and the suggestion was made that the companies increase prices and hold it for ten days. There was no testimony presented showing that such a price move ever took place. (R. 191-192, 405, 810). There was testimony by the three individual defendants in the trial court that such a price move did not take place. There was no evidence, testimonial or documentary, that the Petitioners at any time made price movements that were coordinated with price movements made by their competitors, that the price of gasoline sold by independent dealers was at any time stabilized, that a uniform or coordinated price differential between self service

and full service pumps ever existed, or that any other anticompetitive effect was produced by the Petitioners' actions.[4]

Fred D. Allvine, Ph.D., an expert economist with particular expertise in gasoline marketing and who was particularly familiar with the Florida market (R. 1689-1690), testified that, from the price data available to him and which was also available to the government but not used by the Government at trial, there was no evidence of a price agreement among the Independents and that the economic data indicated a very competitive market. (R. 1721). The Government did not present an economist to testify although a Government economist was permitted

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4/ The Government presented one witness who testified about prices in a limited portion of the Tampa market during a one-week period in May 1977, but his testimony was conclusively demonstrated by the actual price records to be inaccurate. William McKnight, a lessee dealer with Murphy Oil Company, testified that on Thursday, May 19, 1977, he was informed by a supervisor that there would be a price increase among independents in Tampa the following day. He testified that on Friday morning, while driving to work, he observed that the posted prices at a number of independent stations had been increased. He did not increase his own price because a Hess station across the street from him, which he regarded as his key competitor, had not changed its price.

In the court below the Government asserted that it had introduced corroborating documentary evidence, including telephone records showing that price changes at the Petitioners' stations coincided with telephone calls to or from their competitors, indicating a collusive and coordinated price increase. It did introduce telephone records of the alleged conspirators for the week of May 15, 1977, but they indicate no relationship between any telephone calls and any price movement of anyone. The records (GX 17, 18, 19, 20, 21, 23, 29, 30, 35, 36) show a number of calls from telephones at the offices of FIGMA and several retailers to each other, and to other independent retailers. They do not, however, show a single call from FIGMA or any independent retailer to any of the *Petitioners*, or from the *Petitioners* to any of their alleged co-conspirators. Furthermore, there is no testimony about the content of any of those telephone calls.

Finally, the Government's argument that the telephone calls among the Petitioners' competitors evidenced preparations for a coordinated price increase planned by the petitioners and their competitors for May 20 is refuted by the price records, which show that there was no coordinated increase, on May 20 or any other date. On the Thursday that McKnight said he was told that a price increase among independents would occur the next day, there was already in effect a two cent price increase unilaterally posted by the Hughey companies on Wednesday, May 18, which was rescinded at 2:00 p.m. on Friday, May 20, because their competitors, including McRae (who had a station across the street from McKnight) had left their prices unchanged, and in consequence the Hughey companies were losing volume heavily to their competitors. (Cargo Ex. 5).

to sit at counsel table during the testimony of Dr. Allvine and was available had the Government elected to call him as a witness.

The District Court was affirmed by the Fifth Circuit in its refusal to give a specific charge on criminal intent requested by the Petitioners (Request No. 28) and instead in charging the jury that the Petitioners could be convicted for "...knowingly doing something which the law forbids," and that "...a combination or conspiracy to fix prices is unreasonable and illegal as a matter of law...," and that the Government did not have to prove that the Defendants speifically intended to unreasonably restrain trade or that their conduct was an unreasonable restraint of trade. (R. 2179-2180).

REASONS FOR GRANTING THE WRIT

I

IN A CRIMINAL ANTI-TRUST CASE THE ISSUE OF A DEFENDANT'S INTENT MUST BE SUBMITTED TO THE JURY UPON PROPER INSTRUCTIONS, AND CANNOT CONSTITUTIONALLY CONCLUSIVELY BE PRESUMED FROM ANY STATE OF THE EVIDENCE.

United States v. United States Gypsum Co., 438 U.S. 422 (1978), this Court held that intent and state of mind of a defendant is an element of an anti-trust criminal offense which cannot be taken from the jury through use of any conclusive presumption or inference from the effect on the market. 438 U.S. at 446.

In recognition of the admitted differing interpretations which could be placed on the evidence, the fact that a defendant is entitled to a proper instruction on all elements of a crime as well as his theory of the case where there is evidence to support it, and in reliance upon *Gypsum*, the Petitioners requested an instruction on the Government's burden of proof of intent to reduce or eliminate competition, as follows:

> As I indicated to you, a defendant cannot be convicted of the offense charged unless he is proved beyond a reasonable doubt to have acted with the specific intent to produce anti-competitive results, that is, to restrain or eliminate competition. Intent, of course, is not something that can be proved directly, but must be inferred from all the facts and circumstances. In a case such as this, there are two ways in which an intent to restrain or eliminate competition may be shown.
>
> First, if the government proves that the conduct of the defendants actually had an anti-competitive effect, that is, if it is shown beyond a reasonable doubt that the actions of the defendants charged to constitute a price fixing conspiracy actually reduced or eliminated price competition in the retail sale of gasoline, a defendant may be found to have acted with specific intent if you conclude beyond a

> reasonable doubt that he knew, at the time of his conduct that it was likely to have an anti-competitive effect to reduce or eliminate competition.
>
> Second, if the government does not prove that there was an actual anti-competitive effect resulting from the defendants' conduct, he may be found to have acted with a conscious and active purpose of eliminating or restraining competition. It is not enough, without proof of an actual anti-competitive result, that a defendant may have acted with knowledge that his conduct would probably produce that result. (Request No. 28).

Petitioners requested that the jury be instructed on unreasonableness as an element of the crime and that it could not be conclusively presumed, although it could be inferred from proof of a restraint in fact. The District Court instead instructed the jury that the Government did not have to prove a formal agreement and that an agreement could be inferred from conversations and actions (R. 2171), and instructed the jury:

> . . .the government does not have to prove any specific prices which were charged as a result of the alleged conspiracy (R. 2170).

The jury was not instructed that Petitioners' state of mind or intent was a specific element of the offense to be proved as with other distinct elements, or how intent could be proved. Instead, they were instructed that intent existed if defendants ". . .knowingly did something which the law forbids. . ., and that the only intent required for conviction is:

> . . .that the accused knowingly and intentional became members of the conspiracy as charged. . .(R. 2167),

and that price fixing was *per se* illegal and therefore the Government did not have to prove either that Petitioners had *any* specific intent whatsoever to unreasonably restrain trade or that their conduct *was* an unreasonable restraint of trade:

> The crime charged in this case is one which requires proof of intent before the defendants can be convicted. To estab-

> lish the required intent the government must prove beyond a reasonable doubt that the defendants knowingly did something which the law forbids. In this case, that means that the government must prove beyond a reasonable doubt that the defendants knowingly formed, joined or participated in a combination or conspiracy to fix, raise, maintain or stablize retail prices of gasoline in Florida. *Since, as I have already instructed you, a combination or conspiracy to fix prices is unreasonable and illegal as a matter of law, the government does not have to prove that the defendants specifically intended to unreasonably restrain trade or that such conduct is an unreasonable restraint of trade.* It is also unnecessary for the government to prove that the defendants knew that the agreement, combination, or conspiracy to fix prices was a violation of the law.
>
> If you find beyond a reasonable doubt that the defendants conspired in restraint of interstate commerce by fixing retail prices of gasoline in Florida, as alleged in the indictment, such a conspiracy is unlawful even if the conspiracy was formed or engaged in with what the conspirators thought were good motives. (R. 2179-2180). (Emphasis added)

Although the Opinion (657 F.2d at 681) states that in the Fifth Circuit's view, "the government presented direct evidence of price fixing as well as evidence of an exchange of price information . . .," the Opinion concedes that the evidence as a whole, from a jury standpoint, "reasonably might be persuasive" as evidence of a mere exchange of pricing information which *does not invariably have anti-competitive effects.* Here again, there was no evidence of coordinated pricing action, or the effect, if any, the defendant's actions had upon competition. *(Supra,* pp. 5-7). (657 F.2d at 681). Here, the alleged agreement to fix prices is based upon conversation, vague to say the least as to intent, followed by evidence of some isolated market activity, all of which required interpretation to reach any conclusion that an actual criminal agreement in restraint of trade existed.

Although the Opinion seeks to distinguish the two cases, the situation here basically is no different from that which existed in *Gypsum* as evidenced by this Court's Opinion, *supra,*

and the Circuit Court decision after remand. *United States v. United States Gypsum Co.*, 600 F.2d 414 (3rd Cir. 1979).

Both in the present case and in *Gypsum* the specific charge was *price fixing*. In *Gypsum* the defense contended that there was only "price verification" while the Government contended that this was the means by which the "price fixing" was carried out. In both cases the critical issue for the jury was the defendants' intent in their actions. This Court's decision in *Gypsum* recognized that intent could be proved either by proving a conscious purpose of producing anti-competitive effects or by permissible inference from action taken with knowledge of its probable consequences which in fact produces an anti-competitive effect. 438 U.S. at 444, 600 F.2d at 417, n. 1. In *Gypsum* the jury was improperly instructed that intent to violate the Act could be *conclusively* presumed *if* the jury found that the effect of defendants' conduct was to fix prices. Here, the presumption of criminal intent or "mens rea" was wholly applied by the District Court, on its view of the evidence, and the jury was never allowed to independently evaluate the Petitioner's intent under a proper instruction.

In *Gypsum* there also was evidence and testimony that the specific purpose in exchanging price quotations was to stabilize the market and eliminate price fluctuations having nothing to do with the Robinson Patman defense. On remand the Government abandoned its claim of market effect. However, with such "direct evidence" of *price fixing*, on remand, the case was required to be submitted to the *jury* under the "elevated standard" of intent (438 U.S. at 444, n. 21; 600 F.2d at 419, n. 4) requiring a *jury* finding that the Defendants acted with some conscious purpose of producing anti-competitive effects, in the absence of market effect. Assuming direct evidence of "price fixing" in the conscious purpose sense, that is, a conscious intent which nonetheless may fail to have market consequences, the instruction given here removed that basis of determining intent from the jury's consideration and substituted the District Court's presumption of intent:

> . . . a . . . conspiracy to fix prices is . . . illegal as a matter of law, the Government does not have to prove that the defendants specifically intended to unreasonably restrain trade . . . (*Supra*, p. 11).

In *Gypsum* the jury was instructed that if they found that price verification effectuated price fixing the presumption of the necessary criminal intent flowed from such a finding. In the present case, viewing the evidence from the standpoint of proof of intent from inferences to be gained from facts indicating knowledge of probable consequences *and* actual market effect, the Fifth Circuit, after the fact, assumes the jury found "price fixing"[5] and allows the *District Court* to apply a conclusive presumption of intent. The effect is the same. The issue of criminal intent is wholly removed from the jury's consideration. The instruction that fixing prices is unreasonable and illegal *as a matter of law*, thus absolving the Government from the necessity to prove that Defendants intended to unreasonably restrain trade or that such conduct is an unreasonable restraint of trade, is the same type of evidentiary presumption given the jury in *Gypsum*.

The District Court here, by the instructions given, permitted the jury to presume a criminal agreement without requiring a finding that Petitioners' conduct was either purposely intended to have an adverse effect on prices, (regardless of its actual effect) *or* that it did have such an effect, and that Petitioners had knowledge of the probable consequences of their action, from which a jury may, but is *not required*, to infer criminal intent.

The Opinion seeks to distinguish *Gypsum* by making a distinction between "price verification" and "price fixing," overlooking the fact that the violation charged was "price fixing," a *per se* violation, and by contending that the Government in *Gypsum* did not present direct evidence of "price fixing," again overlooking the fact that in *Gypsum* there was specific testi-

5/ It must also be presumed that the jury in *Gypsum* found that there was "price fixing," in fact, since the presumption of criminal intent was predicated upon that fact.

mony from the defendants that their conscious purpose was to "stabilize prices." 657 F.2d at 682. It is not *price fixing* which governs either the necessity of proving intent or the manner by which such intent can be proved. Price fixing is only a characterization of the type of restraint of trade involved.

In seeking somehow to distinguish the present case and *Gypsum*, the Fifth Circuit seizes upon an apparent distinction based on *per se* and "rule of reason" or non *per se* violations of the Sherman Act:

> Unlike price fixing, the mere exchange of price information has not been held to be a *per se* violation of the Sherman Act.
>
> [657 F.2d at 682].
>
> * * *
>
> Neither a conclusive or permissive presumption is at issue here. As explained above, in this case we equate a finding of intent to fix prices with an intent to unreasonably restrain trade.
>
> [657 F.2d at 683-684, n. 7].

The Fifth Circuit, however, acknowledges that it was the District Court's equation of intent to fix prices with the requisite criminal intent to unreasonably restrain trade, and not the jury's under a proper instruction on how to access intent under all the evidence, which controls its affirmance of Petitioners' convictions:

> Rather, the District Court equated the intent to fix prices with the requisite intent to unreasonably restrain commerce.
>
> * * *
>
> We think it follows that if price fixing is inevitably an unreasonable restraint of trade, the intent to fix prices is equivalent to the intent to unreasonably restrain trade.
>
> [657 F.2d at 683].

Clearly, even if one assumes that there was evidence that the jury *could believe* (657 F.2d at 681) of direct "price fixing," due process requires that the jury — not the District Court — determine the Petitioner's intent and the credibility and force of all the evidence and influences therefrom, under proper instructions concerning proof of intent. This case presents the same type of evidentiary "presumption" which was struck down by this Court in *Gypsum* as embodied in the following instruction:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.
>
> [438 U.S. at 430].

This Court's holding in *Gypsum* was that in *any* anti-trust case, intent is an element of a *criminal* violation which cannot be conclusively presumed even from a market result:

> . . . A defendant's state of mind or intent is an element of a criminal anti-trust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.
>
> [438 U.S. at 435].

This Court's analysis at pages 440-443 of *Gypsum*, and especially Note 19, omits any exception to the necessity of proof of intent based on an ultimate effect or conscious purpose which would be a *per se* violation in a civil context. The instruction given had the effect of eliminating the issue of intent from the jury's consideration as an element of the offense. It *presumes* Petitioners' specific "desire" to ". . . unreasonably restrain trade," regardless of whether their actions, in fact, were an ". . . unreasonable restraint of trade," *or* whether any Petitioner knew that "unreasonable restraint of trade" was *practically certain to flow from his conduct.*" 438 U.S. at 445. The Fifth Cir-

cuit's circuitous reasoning that price fixing, *per se*, = unreasonable restraint of trade = *intent* to unreasonably restrain trade, raises an evidentiary presumption of *criminal* intent which is conclusive in nature and is prohibited by *Gypsum* and "principles of Anglo-American jurisprudence" in general. 438 U.S. at 436; also *Sandstrom v. Montana*, 442 U.S. 510 (1979).

This Court in *Gypsum* unequivocally refused to equate any of Sherman's judicially enhanced prohibitions, whether *per se* or not, with "strict-liability criminal offenses." 438 U.S. at 436, 440-443. As stated in *Gypsum*, *criminal* sanctions under the Act are predicated upon intent, and not as a regulatory function over business practices regardless of intent. 438 U.S. at 441-442. Thus, even "direct evidence" of an effect alone ("price fixing") is not *conclusive* evidence of a *criminal* intention to restrain or eliminate trade or competition, although a permissible inference might be drawn by the jury. 438 U.S. at 446. Where intent is based upon the fact of a demonstrable market effect, (i.e., *price fixing*) that fact with knowledge of the probable consequences of the action taken, forms only a *predicate* for the finding of criminal liability:

> . . . we conclude that action undertaking with knowledge of its probable consequences *and having the requisite anti-competitive effects* can be a sufficient predicate for finding of criminal liability under the anti-trust laws. (Emphasis added).
>
> [438 U.S. at 444].

If, having been properly instructed about the nature of the intent required and the character of evidence that will suffice to prove it, the jury concludes that a defendant did intentionally agree with his competitors to fix prices, it should be informed that it may, though it is not required to, infer from that fact alone, without further evidence, that the restraint thereby created was unreasonable. The *per se* rule has a proper place in criminal antitrust enforcement, and the Petitioners do not urge its abolition. They seek only to confine it within its proper constitutional sphere, to be applied as a permissive inference of the

defendants' state of mind.[6] Here, the instruction requested by Petitioners would have allowed a permissive "effect-intent" inference to be drawn by the jury. However, the jury was not allowed even to do that, but as admitted by the Fifth Circuit, the issue of the Petitioners' criminal intent was never submitted for independent determination to the jury because of the *District Court's* impermissible equation of illegal intent from conflicting and ambiguous evidence from which "price fixing" *might* have been found by the jury.

That the Fifth Circuit's decision is contrary to the requirement that criminal intent be proved and not presumed is revealed by the statement at note 7 of the Opinion (657 F.2d at 683-684) that:

> . . . phrasing the issue in terms of a mandatory presumption does not alter our result, however, for the Supreme Court has indicated that mandatory presumptions are not always impermissible.

The basis for the statement is the citation of this Court's opinion in *Ulster County Court vs. Allen*, 442 U.S. 140, 167 (1979). Manifestly, *Allen* does not support the use of conclusive presumptions of specific intent from an act in *any* criminal case. The presumption at issue in *Allen* was a permissive presumption and the jury was so instructed. This Court at page 167 of the Opinion in *Allen*, relied upon by the Fifth Circuit, does not hold that mandatory presumptions of specific criminal intent can exist; rather, that page concerned the quality of evidence necessary under a *permissive* presumption. The *Allen* opinion therein points out that a permissive presumption under the standards set forth in *Leary v. United States*, 395 U.S. 6 (1969) may be relied upon with other evidence to support a finding of guilt. However, when a permissive presumption is the *only* support for a guilty verdict, the fact from which it flows must be sufficient, of itself, to support a finding of guilt beyond a reasonable doubt.

6/ The Fifth Circuit has simply redefined the offense of restraint of commerce, as it pertains to price fixing, to automatically eliminate intent to unreasonably restrain trade as an element requiring distinct proof. Again, this is directly contrary to *Gypsum's* holding that state of mind is always an element and that there are *no* strict liability antitrust *crimes*.

The presumption which the District Court and the Fifth Circuit applied is the type of conclusive presumption which cannot be overcome by testimony and which impermissibly eliminates intent as an element of the offense. 438 U.S. at 446, citing *Morissette v. United States*, 342 U.S. 246, 275 (1952). In *Sandstrom v. Montana, supra*, this Court removed any doubt that where intent is an element of the crime which must be proved, any conclusive presumption of such intent flowing from another act or element of the crime, which presumption cannot be overcome by other evidence, offends due process:

> As in Morissette and United States Gypsum Co., a conclusive presumption in this case would 'conflict with the overriding presumption of innocence which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] fact finding function' which in a criminal case the law assigns solely to the jury.
>
> [442 U.S. at 523].

II

THE ACQUITTAL OF AN EMPLOYEE OR AGENT, WHICH UNDER PRINCIPLES OF COLLATERAL ESTOPPEL WOULD PRECLUDE A SUBSEQUENT PROSECUTION OF HIS EMPLOYER AS DERIVATIVELY LIABLE FOR THE SAME OFFENSE, MUST ALSO BE GIVEN PRECLUSIVE EFFECT WHERE PRINCIPAL AND AGENT ARE TRIED TOGETHER.

After a week of deliberation the jury returned verdicts finding Mike Hughey and James Don Kelley not guilty of the Sherman Act offense with which they were charged, and finding the Petitioner corporations on behalf of which they acted guilty of the same offense. The liability of the corporations is derivative only, as a corporation can act only through the natural persons who are its agents. (R. 2168-2169). The question presented here is whether a verdict against the corporations may constitutionally be sustained where the acquittal of the corporate agents would, in a subsequent trial of the employer, estop the Government to assert the employer's derivative guilt.

The Fifth Circuit misapprehended the issue, equating it with a mere logical inconsistency between two verdicts on different counts of an indictment, as in *Dunn v. United States*, 284 U.S. 390 (1932). 657 F.2d at 685. But that is not the question presented here. This case proceeded or a single count indictment charging all defendants with the identical crime. Dunn was convicted of maintaining a nuisance by keeping intoxicating liquors for sale, and at the same trial acquitted of unlawful possession and sale of such liquors. The evidence showed several transactions in which liquor was sold in a back room of Dunn's sporting goods store, while he was not present. This Court held that, even if the verdicts were logically inconsistent, which was not necessarily the case, the offenses were sufficiently distinct that, had they been indicated and tried separately, the acquittals on the possession and sale charges could not have been pleaded in bar of the nuisance prosecution:

> Each count in an indictment is regarded as if it was a separate indictment. . . . If separate indictments had been presented against the defendant for possession and for maintainence of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.
>
> [284 U.S. at 393].

Had the Government first tried Hughey and Kelley and, following their acquittals, tried the corporations on behalf of which they acted for the same offense, the principles of double jeopardy and collateral estoppel would have applied to the second trial. Whether a subsequent trial of the corporations would be barred entirely, or whether the Government could proceed to trial but would be barred from introducing evidence tending to show that Hughey or Kelley had committed an antitrust offense, would be determined by the existence or non-existence of evidence of arts and statements of corporate agents other than Hughey and Kelley. If they were the only agents who acted on behalf of the companies in the transactions allegedly constituting an offense, the subsequent prosecution of the corporations would be barred altogether. If the companies had other agents who, independent of any participation by Hughey and Kelley, committed conduct which a jury might find to violate the Sherman Act the subsequent prosecution could proceed against the corporations, but benefit of evidence inculpating Hughey or Kelley.

There is no question that these principles would have been applicable in successive trials. The problems of lack of mutuality considered by this Court in *Standefer v. United States*, 447 U.S.

10 (1980) are not present[7] Had Hughey and Kelley, or either of them been convicted, their convictions, together with evidence that their acts were performed within the scope of their employment and within their apparent authority, would have constituted *prima facie* evidence of corporate liability, criminal or civil, in a subsequent trial of the corporations. The verdicts conclusively establishing that neither Hughey nor Kelley participated culpably in a conspiracy to fix prices on behalf of the Petitioners would therefore, under traditional principles of collateral estoppel as embodied in the constitutional protection against double jeopardy, preclude any contention in a subsequent prosecution of the Petitioners that they so acted, and that the Petitioners could be held derivatively liable by reason of acts and statements made by Hughey and Kelley.

There is no good reason to distinguish between successive actions against persons primarily and derivatively liable, and a joint action against the same persons. In either event, the liability of the prime actor is an essential prerequisite to the derivative liability of his employer, and in either case the exoneration of the person primarily liable must be held to exonerate his employer, unless its liability can be founded on some other ground, such as the actions of a different agent. This question apparently has not been decided by any federal court, although on several occasions a decision has been avoided because of the conviction of at least one agent. The Supreme Court of Kentucky has faced

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7/ There are indications in the *Standefer* opinion, which held that nonmutual collateral estoppel does not apply to criminal prosecutions, that in some situations an acquittal in a joint trial may have a preclusive effect that it would not be given even in separate trials. Standefer was convicted of aiding and abetting Niederberger, a revenue agent, in accepting unlawful compensation; in an earlier trial, Niederberger had been acquitted. This Court reaffirmed the principle that, to establish Standefer's guilt as a aider and abettor, the government had to persuade *his* jury that there was a "guilty principal", but it held that the determination of Niederberger's jury did not bind the Government or preclude Standefer's jury from coming to a contrary conclusion. This Court emphasized that it was dealing with results reached by different juries on possibly different evidence, intimating at least that had Standefer and Niederberger been tried together, and the single jury to which the guilt or innocence of both was submitted had acquitted Niederberger as principal, its own determination that no guilty principal existed would have precluded it from finding Standefer guilty as an aider and abettor. Other courts have specifically so held. See, e.g., *United States v. Bernstein*, 533 F.2d 775, 799 (2d Cir. 1976).

the issue, and forthrightly decided it, in *F & H Cattle Co. v. Commonwealth*, 312 Ky. 315, 227 S.W.2d 420 (1950). This Court should likewise hold the constitutional protection against double jeopardy applicable here.

When this issue was raised below, the Government argued that, at least with respect to Cargo Service Stations, Inc., there was evidence independent of Hughey and Kelley which might have made a jury-submissible case.[8] The Fifth Circuit did not consider this question, deeming the acquittals of the agents immaterial to the liability of the corporate employers. It is not necessary that this Court determine that evidentiary issue, since it may be addressed on remand. With respect to those Petitioners as to which the government should acknowledge, or the Fifth Circuit find, that there was insufficient evidence apart from that relating to Hughey and Kelley to make a jury submissible case of conspiracy, a judgment of acquittal should be entered as to it or them. If, as to any Petitioner, the Fifth Circuit finds that a jury submissible case was made independent of the evidence relating to Hughey and Kelley, the conviction of that Petitioner may be affirmed, or, if this Court should reverse on other grounds raised in this petition, be vacated and remanded for a retrial in which the Government would be precluded from introducing any evidence except that which was independent of Hughey and Kelley and which does not tend to impeach the verdicts in their favor.

8/ With one exception there was no evidence that any person acting on behalf of the Petitioners, other than Hughey or Kelley, did any act or made any statement relating in any way to the price of gasoline. William Reece, who was employed by Cargo until July 1977, when he started his own company which now operates five stations, made a few telephone calls to Tampa competitors of Cargo, on Kelley's instructions, to inform them of Cargo price changes. On one occasion he telephoned Ray Pagels of Colonial Service Stations to report that Cargo had restored prices at its Jacksonville stations. At no time did Reece have any discussions with any competitor concerning what if any response the competitor expected to make to the Cargo move. (R. 235, 577-578, 615-617).

CONCLUSION

It is respectfully submitted that the present case presents important and substantial issues going to the very heart of Anglo-American jurisprudence and which require resolution by this Court. This Court must reaffirm the principle that intent is an indispensable element to be proved in any antitrust criminal action, and that the jury, and not the District Court or the Appellate Court, is the trier of fact. Furthermore, the integrity of the criminal justice system is directly dependent upon the logic of its processes. Logic alone, if not direct concepts of due process under the overriding presumption of innocence which attaches to a defendant in any criminal proceeding, requires that the principle of collateral estoppel be applied through the double jeopardy clause of the Fifth Amendment in the circumstances of this case. A Writ of Certiorari should issue for the purpose of establishing these principles.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CARGO GASOLINE COMPANY, CARGO SERVICE STATIONS, INC., and EASTERN OIL COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

CARGO SERVICE STATIONS, INC., T. D. McRae, Incorporated, United Petroleum, Inc., Cargo Gasoline Co., Eastern Oil Company, Defendants-Appellants.

No. 80-5415.

United States Court of Appeals,
Fifth Circuit.
Unit B

Sept. 28, 1981.

In a prosecution under the first section of the Sherman Act, a jury in the United States District Court for the Middle District of Florida at Jacksonville, Susan H. Black, J., found individual defendants not guilty and corporate defendants guilty. The convicted defendants appealed. The Court of Appeals, Frank M. Johnson, Jr., Circuit Judge, held that: (1) evidence sustained conviction; (2) where District Court did not require jury to infer requisite intent from finding that exchange of price information had impact on prices, but, rather, District Court equated intent to fix prices with requisite intent to unreasonably restrain commerce, instruction that Government did not have to prove that defendant specifically intended to unreasonably restrain trade or that such conduct was unreasonable restraint of trade was not objectionable as failing to instruct jury that it must find intent on part of defendants to bring about anticompetitive effects; (3) intent is element of criminal antitrust offense, but finding that defendants intended to fix retail prices of gasoline in Florida supplied criminal intent necessary for conviction and there was no denial of due process; (4) permission to interview jurors to determine if they engaged in compromise was properly denied; and (5) consistency of verdicts was not required.

Affirmed.

1. Commerce 62.10

It is sufficient, for conviction under first section of Sherman

Act, to show either that restraint substantially affected interstate commerce or that it occurred in flow of interstate commerce. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

2. Commerce 62.10

Sherman Act embodies congressional policy to exercise utmost extent of constitutional congressional power in restraining trust and monopoly agreements. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Commerce 56

Constitutional power of Congress to regulate commerce is broad power, even encompassing growing of wheat for consumption by one's family.

4. Commerce 82.20

Power of Congress includes power to regulate movement of persons through more than one state, which movement is undeniably part of intercourse that constitutes commerce.

5. Commerce 62.14

In prosecution under first section of Sherman Act, evidence that one conspirator owned outlets at six motels, located near interstate highways and having substantial number of interstate customers, together with evidence that other conspirators had stations adjoining interstate highways or near interstate boundaries and that one conspirator through office in St. Louis issued credit cards to St. Louis customers and then honored same at Florida stations supported finding that conspiracy to control prices of gasoline at such stations would substantially affect interstate commerce. Sherman Anti-Trust Act, § 15 U.S.C.A. § 1.

6. Monopolies 31(2.4)

Evidence in prosecution under first section of Sherman Act including direct evidence of fixing of gasoline prices as well as evidence of exchange of price information from which jury could infer price fixing permitted finding that conspiracy to fix gasoline prices existed and that defendants knowingly and willingly participated in the conspiracy. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

7. Monopolies 31(2.3)

If jury in prosecution under first section of Sherman Act finds requisite intent, it matters not that finding rests on circumstantial evidence. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies 17(1.8), 31(3)

Price fixing is unreasonable restraint prohibited by antitrust laws, and intent to fix prices is equivalent to intent to unreasonably restrain trade, and where district court did not require jury to infer requisite intent from finding that exchange of price information had impact on prices, but, rather, district court equated intent to fix prices with requisite intent to unreasonably restrain commerce, instruction that Government did not have to prove that defendant specifically intended to unreasonably restrain trade or that such conduct was unreasonable restraint of trade was not objectionable as failing to instruct jury that it must find intent on part of defendants to bring about anticompetitive effects. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. Monopolies 31(3)

Intent is element of criminal antitrust offense, but finding that defendants intended to fix prices of gasoline in Florida supplied criminal intent necessary for conviction of criminal antitrust offense, and there was no denial of due process. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

10. Criminal Law 868

Where district court twice gave jury modified *Allen* charge and jury after week of deliberations returned verdicts acquitting all individuals and convicting corporations and one juror volunteered to defense counsel that eight jurors had consistently voted to acquit all defendants and that four jurors had consistently voted to convict all defendants and that jury finally agreed on verdict rendered though verdict did not in fact represent belief of any juror, defendants were properly denied leave to interview jurors to determine if members of jury engaged in compromise.

11. Criminal Law 878(4)

Consistency of verdicts is not required, and conviction of corporations was not precluded by jury's acquittal of all persons who could have acted as agents.

Appeals from the United States District Court for the Middle District of Florida.

Before FRANK M. JOHNSON, Jr. and HATCHETT, Circuit Judges, and SCOTT*, District Judge.

FRANK M. JOHNSON, Jr., Circuit Judge:

Appellants (Cargo Gasoline Company, Cargo Service Stations, Inc., Eastern Oil Company, T. D. McRae, Inc., and United Petroleum, Inc.), eight other corporate entities, and four individuals were charged in a one count indictment with engaging in a continuing conspiracy to fix prices for the retail sale of gasoline in Florida in unreasonable restraint of commerce, in violation of the Sherman Act, 15 U.S.C.A. § 1. Various other persons or entities, including the Florida Independent Gasoline Marketers Association [FIGMA], were named as unindicted co-conspirators. Eight corporate defendants and one individual defendant entered pleas of *nolo contendere*, which the district court accepted. The eight corporate defendants were sentenced to pay fines ranging from $20,000 to $300,000; the individual defendant was fined $20,000 and sentenced to imprisonment of one year, with eleven months suspended. The other defendants proceeded to trial.

The jury returned verdicts of not guilty with respect to the individual defendants and guilty with respect to the corporate defendants. The corporate defendants, who were fined from $70,000 to $250,000 for a total of $645,000, appeal.

A brief summary of the voluminous evidence presented at trial will suffice for purposes of this opinion. The persons and companies charged in the indictment [hereinafter referred to as conspirators] were independent retail marketers of gasoline in Florida during the period covered by the indictment. Unlike major brand marketers such as Exxon or Texaco, the independent retail marketers did not develop a national image through advertising and did not offer services such as repairs and credit card purchases. Instead, the independents attracted customers on the basis of a lower price, and thus their profits depended on a high volume of trade. The independents were fiercely competitive: a price difference as small as one cent per gallon between two stations in the same general location could result in such a loss of trade from the higher priced station to the lower that the higher priced station might soon cease doing business if its price were not adjusted to meet the competition. This extreme price sensitivity often resulted in "gas wars"; during some gas wars all retailers sold gasoline below cost.

*District Judge of the Middle District of Florida, sitting by designation.

The Government presented twenty-seven witnesses at trial, nineteen of whom were current or former employees of the indicted companies. Other witnesses included executives of the indicted companies' competitors and wholesale suppliers, an individual station operator, and a FIGMA employee. The testimony of the witnesses and documentary evidence, which will be described more fully below, attested to an agreement and a continuous course of action whereby executives of conspirator corporations and FIGMA's director contacted each other to assure coordinated joint price increases, to maintain high prices by challenging "price-cutters," and to stem local price disputes that could lead to gas wars. Appellants, on the other hand, testified that they only exchanged innocent price information and that their activity was necessary to conduct business in the extremely price-sensitive gasoline market.

Five grounds of error are advanced on appeal. First, appellants argue that the evidence was not sufficient to establish that the conspiracy occurred in or affected interstate commerce and thus the conspiracy, if it existed, did not fall within the scope of the Sherman Act. Second, appellants urge that the jury verdict is not supported by sufficient evidence. Third, appellants contend that the district court erred in instructing the jury on the jurisdictional and substantive elements of the offense. Fourth, appellants maintain that the district court erroneously refused them permission to interview the jurors concerning alleged juror misconduct. Last, appellants assert that they are entitled to a judgment notwithstanding the verdict since every person who could have acted as their agent has been acquitted of criminal wrongdoing. We find no merit in these contentions and accordingly affirm the convictions.

[1] We turn first to appellants' contention that the evidence was insufficient to establish that the conspiracy occurred in or affected interstate commerce and thus did not fall within the purview of the Sherman Act. Section 1 of the Sherman Act prohibits conspiracies "in restraint of trade or commerce among the several states." This language has been construed to prohibit restraints that occur in the flow of interstate commerce *or* that substantially affect interstate commerce. *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1082 (5th Cir.), *cert. denied*, 437 U.S. 903, 98 S.Ct. 3088, 57 L.Ed.2d 1133 (1978). Although in the instant case the indictment alleged that the restraint substantially affected interstate commerce and that

it occurred in the flow of interstate commerce, proof of either theory is sufficient to sustain the convictions. *Battle v. Liberty National Life Ins. Co.*, 493 F.2d 39, 48 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975).

[2-4] The Sherman Act embodies a Congressional policy to exercise "the utmost extent of [Congress'] Constitutional power in restraining trust and monopoly agreements . . . " *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95, 95 S.Ct. 392, 397-98, 42 L.Ed.2d 378 (1974) (*quoting United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558, 64 S.Ct. 1162, 1176, 88 L.Ed. 1440 (1944)). As has been repeatedly demonstrated, the constitutional power of Congress to regulate commerce is a broad power, even encompassing the growing of wheat for consumption by one's family. *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *see, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). The power of Congress includes the power to regulate the movement of persons through more than one state, for this movement is undeniably part of the intercourse that constitutes commerce. *E.g., Heart of Atlanta Motel, Inc. v. United States, supra*, 379 U.S. at 255-56, 85 S.Ct. at 356-57; *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317 (1946); *Hoke v. United States*, 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (1913); *Passenger Cases*, 7 How. 283, 12 L.Ed. 702 (1849). Hence, if an action or practice of defendants affected the movement of persons from one state to another, it affected interstate commerce and is within the scope of the Sherman Act.

[5] The Government presented evidence that one of the conspirators owned outlets at six Days Inn Motels, which were located near interstate highways and which had a substantial number of interstate customers. Furthermore, the evidence showed that other conspirators had stations adjoining interstate highways or near the state boundaries. Finally, one of the conspirators, through its office in St. Louis, issued credit cards to its St. Louis customers and then honored these credit cards at its Florida stations. We think that this evidence,[1] viewed in light of

[1] In our automobile-oriented society the vast majority of persons depend upon gasoline-powered vehicles not only to travel but also to engage in their livelihoods, which, in our complex and interrelated economic system, usually affect interstate commerce. Hence, a persuasive argument can be made that an agreement restraining the trade of gasoline must necessarily affect interstate commerce. However, because the Government presented evidence showing a nexus between the interstate travel of persons and the conspirator gasoline stations, we do not address the merits of the above argument.

modern transportation patterns, amply supports a finding that a conspiracy to control the prices of gasoline at these stations would substantially affect interstate commerce.[2]

[6] Appellants next urge that the jury verdict is not supported by sufficient evidence. But the verdict of the jury must be sustained "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *see, e.g., United States v. Conway*, 632 U.S. 641 (5th Cir. 1980). In its attempt to prove that the persons named in the indictment engaged in a conspiracy to fix prices, the Government presented evidence that on several occasions FIGMA's Executive Director Syd Gervin contacted Cecil Liles, an employee of co-conspirator Key, and asked Liles to "take a look at" Key's outlets in areas where there were "going to be price moves." These contacts occurred a day to a week prior to the proposed price moves. During these contacts Gervin specified the geographic area to be affected by the price move, the date of the move, the exact amount of the price increase, and, on some occasions, the companies involved in the price move. Gervin also asked Liles if he would support the price moves; in most instances, Liles testified, he agreed. At least twelve other witnesses, some who were not indicted as conspirators and others who entered pleas of *nolo contendere*, testified concerning similar conversations with Gervin. Furthermore, Liles testified that he had numerous direct contacts with his competitors, including agents of appellants; participants in these conversations discussed specific dates for the moves, the amount of the increases and the other competitors who "could be depended upon" to support the price increases. Several witnesses testified about a meeting between appellants and several competitors; those present engaged in a wide-ranging discussion about the appropriate price differential to be charged for gasoline at self-service gasoline stations and full-service stations. As a result of this discussion, participants reached what one witness termed an "implied understanding" concerning the appropriate price difference. Participants also reached an implied understanding concerning raising the retail price of gasoline. In some instances the Government introduced documentary evidence, such as toll telephone records, to substantiate the testimony of its witnesses. The Government

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[2] Because we find that the evidence supports the finding that the conspiracy substantially affected interstate commerce, we have no need to address the issue whether the restraint occurred in the flow of commerce.

also introduced evidence showing price changes at appellants' stations that coincided with some of the telephone calls.

Appellants seek to characterize the evidence summarized above as evidence of a mere exchange of pricing information. Such an exchange of pricing data, appellants reason, "does not invariably have anticompetitive effects; indeed, such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16, 98 S.Ct. 2864, 2875 n.16, 57 L.Ed.2d 854 (1978). Appellants' reasoning might be persuasive on a jury, but it does not persuade us to overturn the jury's contrary determination. The Government presented direct evidence of price fixing as well as evidence of an exchange of price information from which the jury could infer price fixing. The jury apparently chose to credit the testimony of the Government witnesses. Viewing the evidence in the light most favorable to the jury verdict, *see, e.g., Glasser v. United States, supra*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, we find that the record, including the evidence recounted above and the inferences reasonably drawn therefrom, is such that reasonable persons could conclude beyond a reasonable doubt that a conspiracy to fix gasoline prices existed and that appellants knowingly and willingly participated in the conspiracy. Accordingly, we will not disturb the verdict of the jury.

Appellants advance as their third contention the argument that the district court erred in instructing the jury on the jurisdictional and substantive elements of the offense. The argument relating to the instruction on jurisdiction clearly has no merit. The instruction contained a correct statement of the law. *See United States v. Cadillac Overall Supply Co., supra*, 568 F.2d 1078; *Hardrives Co. v. East Coast Asphalt Corp.*, 329 F.2d 868 (5th Cir.), *cert. denied sub nom.* 379 U.S. 903, 85 S.Ct. 192, 13 L.Ed.2d 176 (1964); 1 P. Areeda & D. Turner, Antitrust Law ¶¶ 231-33.

We find equally unpersuasive the argument relating to the instruction on the substantive element of the offense. The district court charged the jury:

> To establish the required intent the Government must prove beyond a reasonable doubt that the defendants knowingly did something which the law forbids. In this case,

> that means that the Government must prove beyond a reasonable doubt that the defendants knowingly formed, joined or participated in a combination or conspiracy to fix, raise, maintain or stabilize retail prices of gasoline in Florida. Since, as I have already instructed you, a combination or conspiracy to fix prices is unreasonable and illegal as a matter of law, the Government does not have to prove that the defendants specifically intended to unreasonably restrain trade or that such conduct is an unreasonable restraint of trade . . . .

Relying on *United States v. United States Gypsum Co., supra,* 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854, appellants urge that this instruction was erroneous because it did not instruct the jury that it must find an intent on the part of appellants to bring about anticompetitive effects. We find appellants' reliance on *Gypsum* to be misplaced.[3]

Defendants in *Gypsum* were charged with conspiracy to raise, fix, maintain and stabilize the price of their products. In *Gypsum* the Government focused on interseller price verification, charging that price exchanges among defendants were part of an agreement that had the effect of stabilizing prices and policing agreed-upon price increases. Defendants defended on the ground that the exchanges were for purposes of complying with the Robinson-Patman Act and preventing customer fraud. Thus, defendants reasoned, their purpose in engaging in the price verifications was a threshold factual question. The district court adopted this reasoning in part and charged the jury that if the exchanges of price information were undertaken in a good faith effort to comply with the Robinson-Patman Act verification alone would be insufficient to establish illegal price fixing. However, the district court in *Gypsum* deemed the purpose of defendant's actions irrelevant if the effect of the verification was to fix, maintain, or stabilize prices. Accordingly, the jury was charged:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise,

[3] Part of appellants' confusion is due to their consistent characterization of their conduct as being an exchange of prices. As we explained earlier, at trial the Government presented evidence of price fixing and the jury chose to credit this evidence.

> fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

United States v. United States Gypsum Co., supra, 438 U.S. at 430, 98 S.Ct. at 2869. Upon conviction, defendants appealed.

The Court of Appeals for the Third Circuit reversed the convictions and the Supreme Court affirmed that result. The Supreme Court concluded that a defendant's intent is an "element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom . . . . " *Id.* at 435, 98 S.Ct. at 2872. Because the instruction of the district court had the effect of substituting for the element of intent a finding that the exchanges of pricing information raised, fixed, maintained, and stabilized prices, reversal of the convictions was in order.

The situation in *Gypsum* is easily distinguishable from that of the instant case. Even though the Government in *Gypsum* charged that the effect of defendants' conduct was to fix prices, the Government did not present direct evidence of price fixing. Rather the Government focused on the exchange among competitors of price information as providing circumstantial evidence of price fixing. Unlike price fixing, the mere exchange of price information has been held not to be a *per se* violation[4] of

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[4] Certain types of restraints, such as price fixing or some types of market division, are in and of themselves unreasonable restraints on trade; these restraints are referred to as *per se* violations of the antitrust statutes. *See, e.g., United States v. Topco Associates,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (market division); *Northern Pacific Railway v. United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958) (typing arrangement); *Fashion Originators' Guild of America v. Federal Trade Comm'n,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941) (collective refusal to deal); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (price fixing). The rationale underlying the concept of *per se* violations was explained in *Northern Pacific Railway v. United States, supra,* 356 U.S. at 5, 78 S.Ct. at 518.

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at

the Sherman Act. *E.g., United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113, 95 S.Ct. 2099, 2115, 45 L.Ed.2d 41 (1975). The reason that the mere exchange of price information is not a *per se* violation is obvious: "The exchange of price data and other information among competitors does not invariably have anticompetitive effects . . . . " *United States v. United States Gypsum Co., supra*, 438 U.S. at 441 n.16, 98 S.Ct. at 2875 n.16. It was precisely because the activity could have either a desirable or undesirable effect that the *Gypsum* Court refused to mandate that a conclusion that the requisite intent was present must follow from a finding that the exchange of price information had an impact on prices. *Id.* at 446, 98 S.Ct. at 2878.

[7,8] Unlike the situation in *Gypsum*, in the present case the district court did not require the jury to infer the requisite intent from a finding that the exchange of price information had an impact on prices.[5] Rather, the district court equated the intent to fix prices with the requisite intent to unreasonably restrain commerce. Price fixing, as opposed to price verification, is an activi-

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large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210, [60 S.Ct. 811, 838, 84 L.Ed. 1129]; division of markets, *United States v. Addyston Pipe & Steel Co.*, [6th Cir.,] 85 F. 271, aff'd, 175 U.S. 211, [20 S.Ct. 96, 44 L.Ed. 136]; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, [468, 61 S.Ct. 703, 708, 85 L.Ed. 949]; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392, [68 S.Ct. 12, 92 L.Ed. 20].

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[5] The instant case differs from *Gypsum* in an additional way. In the instant case, direct evidence of price fixing was presented; in *Gypsum* the Government relied on circumstantial evidence, in the form of price verifications, to prove price fixing. This distinction, however, does not affect the outcome of this case. Convictions in this case would be valid even if they rested solely on circumstantial evidence *so long as* the jury was required, as here, to find that defendants knowingly engaged in a conspiracy to fix prices. If the jury finds the requisite intent, it matters not that the finding rests on circumstantial evidence. *See, e.g., Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954) (circumstantial evidence is intrinsically no different from testimonial evidence).

ty with inevitable anticompetitive effects;[6] because of its inevitable effects the Supreme Court designated it illegal *per se*. *United States v. Socony-Vacuum Oil Co., supra*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129; *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 852 (5th Cir. 1981). In other words, price fixing is an unreasonable restraint prohibited by the antitrust laws. We think it follows that if price fixing is inevitably an unreasonable restraint of trade, the intent to fix prices is equivalent to the intent to unreasonably restrain trade. This was the position adopted by the Supreme Court forty-one years ago in *United States v. Socony-Vacuum Oil Co.*, and we find nothing in *Gypsum* to alter that position. *Accord, United States v. Koppers Co.*, 652 F.2d 290 (2d Cir. 1981); *United States v. Gillen*, 599 F.2d 541 (3d Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 137, 62 L.Ed.2d 89 (1979); *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 727, 62 L.Ed.2d 728 (1980); *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101 (7th Cir), *cert. denied*, 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979).

[9] Appellants alternatively urge that the jury instruction denied them due process of law because it allowed the jury to convict them absent a showing that all elements of the crime were present[7]. In specific, appellants argue that intent to restrain competition is an element of a violation of the Sherman Act and that the instruction of the district court improperly allowed the jury to convict absent a finding of intent. We agree that intent is an element of a criminal antitrust offense. *United States v. United States Gypsum Co., supra*, 438 U.S. 422, 98 S.Ct. 2864,

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[6] "[R]esort to the *per se* rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a 'naked restraint of trade.' " *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973); *see Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343 (5th Cir. 1980), *cert. denied*, ___U.S.___, 101 S.Ct. 208, 66 L.Ed.2d 90. We find no unusual facts in this case to warrant a conclusion that the price fixing activity engaged in by appellants was anything other than a "naked restraint of trade."

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[7] Appellants liken the instant case to cases concerning presumptions. *See Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Tyler v. Phelps*, 622 F.2d 172 (5th Cir. 1980). Conclusive presumptions are conclusions that the law requires the jury to make under certain circumstances; permissive presumptions are conclusions that the law allows the jury to make under certain circumstances. An instruction that a defendant on trial for deliberate homicide must have intended the consequences of his or her voluntary actions is a conclusive presumption. This instruction would effec-

57 L.Ed.2d 854. We do not agree, however, that the instruction of the district court improperly allowed the jury to convict absent a finding of criminal intent. The jury was instructed that "the Government must prove beyond a reasonable doubt that the defendants knowingly formed, joined or participated in a conspiracy to fix, raise, maintain or stabilize retail prices of gasoline in Florida." In other words, the jury was instructed that the Government must prove that appellants intended to fix prices. As we discussed above, because fixing prices is by itself an unreasonable restraint of trade, an intent to fix prices is equivalent to an intent to unreasonably restrain trade; therefore, a finding that appellants intended to fix prices supplies the criminal intent necessary for a conviction of a criminal antitrust offense. There was no denial of due process. *Accord, United States v. Foley, supra,* 598 F.2d at 1323.

[10] Appellants' next argument concerns potential juror misconduct. On the second day of deliberations the jury announced itself hopelessly deadlocked. The district court twice gave the jury a modified *Allen* charge, *see Allen v. United States,* 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). After a week of deliberations, the jury returned the verdicts acquitting all individuals and convicting the corporations. After the verdict

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tively eliminate intent as an element of the offense, *e.g., Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and is thus impermissible. *Sandstrom v. Montana, supra,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39. On the other hand, an instruction that a jury may infer illegal possession of a firearm by persons in an automobile from evidence of the presence of a firearm in the automobile is a permissive presumption. Because there is a rational connection between the presence of the firearm and the occupant's possession of the firearm and because the jury is free to reject the presumption, such an instruction is permissible. *Ulster County Court v. Allen,* 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

Neither a conclusive nor a permissive presumption is at issue here. As explained above, in this case we equate a finding of intent to fix prices with an intent to unreasonably restrain trade. Nevertheless, appellants phrase the issue in terms of presumptions, arguing that the district court mandated a presumption of intent to restrain trade from a finding that appellants fixed prices. Phrasing the issue in terms of a mandatory presumption does not alter our result, however, for the Supreme Court has indicated that mandatory presumptions are not always impermissible. To base a conviction on a mandatory presumption, "the fact proved [must be] sufficient to support the inference of guilt beyond a reasonable doubt." *Ulster County Court v. Allen, supra,* 442 U.S. at 167, 99 S.Ct. at 2230. Clearly, evidence of intentional price fixing is sufficient to support the inference of intentional unreasonable restraint beyond a reasonable doubt; indeed, we think the fact proved conclusively establishes the "inference" of guilt.

was announced one of the jurors approached defense counsel and volunteered that the jury had been at an impasse throughout deliberations, that eight jurors had consistently voted to acquit all defendants, and that four jurors had consistently voted to convict all defendants. The juror stated that after a week of deliberations the jury agreed on the verdict rendered, even though the verdict did not in fact represent the belief of any juror. Appellants moved for permission to interview the jurors; the court denied the motion.

Appellants insist that they should have been allowed to interview the jurors to determine if the members of the jury engaged in a compromise. Arguments such as this have been repeatedly rejected by this Court on the ground that "[i]nquiries that seek to probe the mental process of jurors . . . are impermissible." *Llewellyn v. Stynchcombe*, 609 F.2d 194, 196 (5th Cir. 1980); *see United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980), *cert. denied*, ____U.S.____, 101 S.Ct. 570, 66 L.Ed.2d 471. Appellants' argument is clearly without merit. *See, e.g., United States v. Johnson*, 495 F.2d 1097, 1103 (5th Cir. 1974) ("It is axiomatic that a jury verdict cannot be impeached by evidence of intrinsic as opposed to extrinsic influences on juror deliberations"); *Luna v. Beto*, 474 F.2d 95 (5th Cir.), *cert. denied*, 414 U.S. 845, 94 S.Ct. 108, 38 L.Ed.2d 92 (1973); *Cunningham v. United States*, 356 F.2d 454 (5th Cir.), *cert. denied*, 384 U.S. 952, 86 S.Ct. 1573, 16 L.Ed.2d 548 (1966).

[11] Finally, appellants assert that they are entitled to a judgment notwithstanding the verdict since every person who could have acted as their agent has been acquitted of criminal wrongdoing. In support of their argument, appellants cite *C & H Cattle Co. v. Commonwealth*, 312 Ky. 315, 227 S.W.2d 420 (1950). While *C & H Cattle Co.* might be controlling in Kentucky, it is clearly not the law in this Circuit. In this Circuit consistency is not required. *Dugan Drug Stores, Inc. v. United States*, 326 F.2d 835, 837 (5th Cir. 1964); *see Stein v. United States*, 363 F.2d 587 (5th Cir.), *cert. denied*, 385 U.S. 934, 87 S.Ct. 294, 17 L.Ed.2d 214 (1966). "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Dunn v. United States*, 284 U.S. 390, 394, 52 S.Ct. 189, 191, 76 L.Ed. 356 (1932). As the Supreme Court explained in a similar case in which the corporation was acquitted and the individual was convicted, "whether the jury's verdict was a result of carelessness or compromise or a belief

that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries." *United States v. Dotterweich*, 320 U.S. 277, 279, 64 S.Ct. 134, 135, 88 L.Ed. 48 (1943); *American Medical Association v. United States*, 130 F.2d 233, 253 (D.C.Cir. 1942), *aff'd*, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943); *United States v. General Motors Corp.*, 121 F.2d 376, 411 (7th Cir.), *cert. denied*, 314 U.S. 618, 62 S.Ct. 105, 86 L.Ed. 497 (1941).

We find no error in the record and accordingly AFFIRM.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80—5415

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
CARGO SERVICE STATION, INC., T. DO.,
McRae, INCORPORATED, UNITED PETROLEUM,
INC., CARGO GASOLINE CO., EASTERN
OIL COMPANY,

Defendants-Appellants.

Appeal from the
United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion September 28, 11 Cir., 1981, _____F.2d_____).
(November 2, 1981)

Before FRANK M. JOHNSON, JR., and HATCHETT, Circuit Judges; and SCOTT, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

*Former Fifth Circuit Case; (Section 9 (1) of Public Law 96-452-October 14, 1980)

APPENDIX C

CONSTITUTION OF THE UNITED STATES, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE SHERMAN ANTITRUST ACT, §1; 15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1223

In the Supreme Court of the United States

OCTOBER TERM, 1981

CARGO GASOLINE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a jury in a criminal antitrust case may be instructed that a conspiracy to fix prices is illegal per se under the Sherman Act, and that proof that the defendant knowingly participated in the price-fixing conspiracy is sufficient to establish the intent element of the offense.

2. Whether a defendant corporation convicted of price-fixing is entitled to judgment notwithstanding the verdict when the jury acquits some of its agents of the same charge.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-15) is reported at 657 F. 2d 676.

JURISDICTION

The judgment of the court of appeals[1] was rendered on September 28, 1981. A petition for rehearing was denied on November 2, 1981 (Pet. App. A-16). The petition for a writ of certiorari was filed on December 31, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The case was decided by Unit B of the United States Court of Appeals for the Fifth Circuit, which on October 1, 1981, became the United States Court of Appeals for the Eleventh Circuit.

STATEMENT

In a one-count indictment returned on September 27, 1979, a grand jury charged petitioners Cargo Gasoline Company, Cargo Service Stations, and Eastern Oil Company, ten other corporate entities, and four individuals with engaging in a continuing conspiracy to fix retail gasoline prices in Florida during the period between January 1975 through December 1977, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Various other persons, including Florida Independent Gasoline Marketers Association (FIGMA), an association of independent gasoline retailers, were named as unindicted co-conspirators. Eight corporate defendants and one individual defendant pleaded nolo contendere.[2] The jury returned verdicts of not guilty with respect to the remaining three individual defendants, and guilty with respect to all five corporate defendants, including petitioners. Petitioners were sentenced to pay fines aggregating $500,000.[3] Pet. App. A-4; 44 C.R. 11, 18.[4]

1. The government's evidence is summarized in the opinion of the court of appeals (Pet. App. A-4 to A-5, A-7). Briefly, the companies charged in the indictment were independent gasoline retailers in Florida, who attracted customers by pricing their gasoline lower than the major marketers, such as Exxon or Texaco (*id.* at A-4). At least thirteen government witnesses who were Florida independent retail gasoline company employees with authority to set retail

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[2]The eight corporate defendants were sentenced to pay fines ranging from $20,000 to $300,000; the individual defendant was sentenced to one year's imprisonment, with eleven months suspended, and a fine of $20,000 (Pet. App. A-4).

[3]Cargo Gasoline Co. was fined $125,000; Eastern Oil Company was fined $250,000; and Cargo Service Stations was fined $125,000.

[4]"44 C.R." refers to Volume 44 of the clerk's record in the district court.

gasoline prices testified that they were contacted by FIGMA's Executive Director, Syd Gervin, who sought support for prospective price moves (*id.* at A-7). Gervin specified the geographic area to be affected, the date of the move (usually one day to one week from the time of Gervin's contact), and, on some occasions, stated that petitioners, who were FIGMA members, were "leading" the price move (Pet. App. A-7; Tr.[5] 231-232, 282, 354, 494, 673-675, 883, 914, 1044, 1265). Employees of petitioners' competitors also testified about numerous direct telephone contacts with petitioners' agents to discuss specific dates for price moves, the amount of the increases, and the other competitors who "could be depended upon" to support the price increases (Pet. App. A-7; Tr. 107-108, 113-114, 119, 232, 236, 614, 679 h-i, 799, 801-803, 927, 929, 1047-1058, 1066, 1073).[6] Finally, several government witnesses testified that petitioners' executives and agents of petitioners' competitors met for a wide-ranging discussion about the appropriate price differential between full-service and self-service gasoline (Pet. App. A-7). The participants reached what one witness termed an "implied understanding" on the appropriate differential, as well as on an increase in the retail price for the Tampa area (Pet. App. A-7; Tr. 139-142, 176, 184-191, 402-406).

2. The court of appeals unanimously affirmed the judgments of conviction (Pet. App. A-1 to A-15). The court rejected petitioners' contention that the government had proven a mere exchange of pricing information (*id.* at A-8).

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[5]"Tr." refers to the trial transcript.

[6]The testimony of the government witnesses was buttressed in some instances by telephone toll records and by documentary evidence showing price changes at the defendants' stations that coincided with the telephone calls (Pet. App. A-7 to A-8).

The court observed that there was "direct evidence of price fixing" as well as evidence from which price fixing could be inferred (*ibid.*). From this evidence, the court held, the jury could conclude beyond a reasonable doubt that "a conspiracy to fix gasoline prices existed and that appellants knowingly and willingly participated in the conspiracy" (*ibid.*).

The court of appeals also rejected petitioners' argument that the district court's instruction had allowed the jury to convict without finding an intent to restrain competition. Noting that the jury was required to find an intent to fix prices in order to convict, and that there was direct evidence of price-fixing, the court of appeals reasoned that, under the per se rule, a finding that petitioners had intended to fix and had in fact fixed prices was sufficient to establish an intent to restrain competition. The court concluded, therefore, that the element of intent had not been withdrawn from the jury. Pet. App. A-9 to A-13.

Finally, the court of appeals held that petitioners were not entitled to judgment notwithstanding the verdict simply because the individual defendants who had acted as their agents had been acquitted. The court stressed that consistency in verdicts is not required. Pet. App. A-14 to A-15.[7]

ARGUMENT

The decision of the court of appeals, on which we generally rely, is correct and does not conflict with prior decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

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[7]The court also rejected petitioners' contentions that the evidence was insufficient to establish that the conspiracy occurred in or affected interstate commerce, and that the district court erred in not permitting counsel to interview the jurors on the question whether they had reached a compromise verdict. Those issues, as well as the sufficiency of the evidence to prove a price-fixing conspiracy, are not raised by the petition. See Pet. App. A-5 to A-8, A-13 to A-14.

1. Petitioners argue that the district court's instruction to the jury on the element of intent conflicts with the holding of this Court in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). The trial judge in this case instructed the jury that the government could establish the intent required by the Sherman Act if it proved that petitioners had knowingly participated in a price-fixing conspiracy. Petitioners contend that *Gypsum*, by contrast, requires proof that a defendant "intended to unreasonably restrain trade" (Pet. 13). Petitioners' premise is erroneous; the court of appeals correctly concluded that the district court's instruction was correct.

In *Gypsum*, the trial court had instructed the jury that intent under the Sherman Act was presumed as a matter of law where the defendants' conduct had an effect on prices.[8] This Court disagreed with that "strict-liability" interpretation of the Act (438 U.S. at 436), and held that intent must be proven as a specific element of a criminal antitrust violation. *Id.* at 443. But nothing in *Gypsum* suggests that the government must prove an intent more culpable than an intent to fix prices. Petitioners' argument, in essence, is that *Gypsum* rejected for criminal cases the rule that price fixing

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[8]The conduct charged in *Gypsum* was interseller price verification, a business practice which, unlike the price fixing proven in this case, does not necessarily constitute a per se violation of the Sherman Act. *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 441 n.16. Relying on their own evidence (Pet. 4-8) which, they argue, showed only an exchange of price information, petitioners contend that the distinction between *Gypsum* and this case is illusory (Pet. 11-14). The court of appeals acknowledged that a mere exchange of price information does not invariably have anticompetitive effects (Pet. App. A-8). But it observed that the jury "chose to credit the testimony of the Government witnesses," testimony which included "direct evidence of price fixing" (*ibid.*). Having failed to seek review of the court of appeals' holding on the sufficiency of the government's evidence, petitioners cannot now substitute their version of the evidence to bolster their argument on the intent issue.

is illegal per se. That contention is belied by the opinion itself, which reaffirmed the per se illegality of certain conduct with unquestionably anticompetitive effects. *Id.* at 440-441.

Petitioners urge, however, that by equating intent to fix prices with intent to restrain trade, the per se rule impermissibly withdraws a factual question about the defendant's intent from the jury. Every court of appeals that has considered this argument has rejected petitioners' contention.[9] As these courts have noted, the per se rule does not create an evidentiary presumption that requires the fact-finder to presume an essential fact from proof of another fact. Rather, the per se rule is a substantive principle of law that defines the elements of the criminal offense. See *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396-398 (1927); see also *id.* at 400 ("any agreement for price-fixing, if found, would have been illegal as a matter of law"). It reflects an authoritative interpretation of the Sherman Act by this Court which Congress has never disturbed. Under this interpretation, certain types of conspiracies are illegal as a matter of law just as if Congress had expressly denounced them in the Sherman Act.

When the conspiracy at issue is subject to the per se rule, the factual question for the jury to resolve is whether the defendant knowingly and intentionally engaged in that conspiracy. The per se rule does not relieve the government of

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[9] *United States* v. *Koppers Co.*, 652 F. 2d 290, 293-296 (2d Cir.), cert. denied, No. 81-548 (Nov. 30, 1981); *United States* v. *Society of Independent Gasoline Marketers*, 624 F. 2d 461, 464-465 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F. 2d 444, 451-466 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Gillen*, 599 F. 2d 541, 544-545 (3d Cir.), cert. denied, 444 U.S. 866 (1979); *United States* v. *Brighton Building & Maintenance Co.*, 598 F. 2d 1101, 1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979); *United States* v. *Manufacturers' Association of the Relocatable Building Industry*, 462 F. 2d 49, 50-52 (9th Cir. 1972).

this burden of proof. But because such a conspiracy is illegal as a matter of law, once the jury resolves that factual issue adversely to the defendant, no further proof regarding intent is required. See generally *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-222 (1940).[10]

In this case, the district court instructed the jury that the element of intent was satisfied by proof that petitioners had participated knowingly in the price fixing conspiracy.[11] The court of appeals properly concluded that the instruction was a correct statement of the law. There is no reason to reexamine that ruling.

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[10]"Behavior is illegal per se when the plaintiff need prove only that it occurred in order to win his case, there being no other elements to the offense and no allowable defense." R. Bork, *The Antitrust Paradox* 18 (1978).

[11]The court instructed the jury in part as follows (Pet. App. A-8 to A-9):

> To establish the required intent the Government must prove beyond a reasonable doubt that the defendants knowingly did something which the law forbids. In this case, that means that the Government must prove beyond a reasonable doubt that the defendants knowingly formed, joined or participated in a combination or conspiracy to fix, raise, maintain or stabilize retail prices of gasoline in Florida. Since, as I have already instructed you, a combination or conspiracy to fix prices is unreasonable and illegal as a matter of law, the Government does not have to prove that the defendants specifically intended to unreasonably restrain trade or that such conduct is an unreasonable restraint of trade * * *.

The court also defined "knowing" action as follows (Tr. 2176-2177):

> Before the jury may find that a defendant became a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was formed, and that the defendant knowingly joined or participated in the unlawful plan, with the intent to advance or further some object or purpose of it.
>
> To act or participate knowingly means to act or participate voluntarily and intentionally, and not because of mistake, or accident, or other innocent reason. So, if a defendant, with understanding of the general character of a plan, voluntarily or intentionally joins, encourages, advises or assists for the purpose of

2. Petitioners argue that the court of appeals erred in not reversing their convictions because their agents, the individual defendants, were acquitted. They contend that if the individual defendants had been tried first and acquitted, and the corporate defendants tried subsequently, the corporations could not have been held derivatively liable for the acts of their agents. From this petitioners reason that the Double Jeopardy Clause and principles of collateral estoppel should prevent inconsistent verdicts in the same trial. Pet. 19-22.

This argument is without merit. Petitioners point to no authority for the proposition that either the Double Jeopardy Clause or the rule of collateral estoppel has any application in the context of a single trial proceeding in which some defendants are convicted and others are acquitted.[12] "While symmetry of results may be intellectually satisfying, it is not required." *Standefer* v. *United States*, 447 U.S. 10, 25 (1980); *Hamling* v. *United States*, 418 U.S. 87, 101 (1974). As this Court explained in a case where the corporation was acquitted and its agent convicted, "[w]hether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries." *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943).

In any event, the government's evidence established that other agents of the petitioners, who were not acquitted by the jury, knowingly participated in the price-fixing conspiracy charged in the indictment on behalf of their respective

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furthering the undertaking or scheme, he thereby becomes a knowing participant—a conspirator.

[12]Indeed, as a general matter, neither doctrine would apply even to consecutive criminal trials involving different defendants. See *Standefer* v. *United States*, 447 U.S. 10, 21-25 (1980).

corporations.[13] Thus, there is no reason for this Court to consider whether an acquittal of the corporate defendants would have been required if all their agents had been absolved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1982

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[13]Reece, an employee of Cargo who had pricing responsibilities, testified that he called T.D. McRae, president of two of the other defendants, to complain that McRae's stations had not moved up their prices (Tr. 610). McRae replied that he "would get them up" (Tr. 611). If Cargo decided to lead a price increase, Reece would call Cargo's competitors in the affected area. He called Pagels of Colonial Oil to tell him Cargo was "going up" in Jacksonville and to ask him to take a "look at it" to see if he could "support it" (Tr. 614). Pagels agreed to do so (*ibid.*).

Attending the meeting where an "implied understanding" (Pet. App. A-7) was reached on the appropriate difference between the prices charged for full-service and self-service gasoline were, in addition to the individual defendants, Chet Thatcher, President of Eastern, and Mr. Diamond of Eastern (Tr. 176, 184-185).